In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-916

OCEAN DRILLING AND EXPLORATION COMPANY,

Petitioner

versus

QUALITY EQUIPMENT, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Ocean Drilling and Exploration Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 28, 1978.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including argument and the judge's statement on granting dismissal of Ocean Drilling and Exploration Company's demands against Quality Equipment, Inc. are reproduced in Appendix A, *infra*, p. A-1 of this Petition.

The opinion of the Court of Appeals for the Fifth Circuit

is reported at 577 F.2d 273 and a copy is reproduced in Appendix B, *infra*, p. A-11, of this Petition.

JURISDICTION

The judgment (Appendix C, *infra*, p. A-26) and opinion (Appendix B, *infra*, p. A-11) of the Court of Appeals for the Fifth Circuit affirming the Trial Court's dismissal of Ocean Drilling and Exploration Company's demands against Quality Equipment, Inc., was entered on July 28, 1978. A timely Petition for Rehearing was denied on September 11, 1978. (Appendix D, *infra*, p. A-28). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether, under Louisiana law applicable as surrogate federal law in a factual situation related to the production of oil and gas from the Outer Continental Shelf, a decision finding a contractual indemnity provision ambiguous is in conflict with controlling precedent.

II.

Whether, under the Outer Continental Shelf Lands Act, 43 USC § 1333(a)(2) and *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969), a federal court may apply Texas rules of contract interpretation to a contractual provision governing the relationship between parties in connection with operations conducted on an artificial island or fixed structure located on the Outer Continental Shelf off the coast of Louisiana.

STATUTE INVOLVED

The relevant portion of the Outer Continental Shelf Lands Act is as follows:

§ 1333. Laws and regulations governing lands - Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1)...

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) ...

Jurisdiction of United States district courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district of the adjacent State nearest the place where the cause of action arose.

43 USC § 1333, 67 Stat. 462.

STATEMENT OF THE CASE

On August 30, 1973 Roy A. Mott was employed by Quality Equipment, Inc. (Quality) as a welder. Under the terms of a Master Service Contract, (Appendix E, *infra*, p. A-30), executed on August 11, 1973 by Quality and Ocean Drilling and Exploration Company (ODECO), he began work on a small production platform owned by ODECO located on the Outer Continental Shelf off the coast of Louisiana. As he was descending a ladder from the top deck of the platform to the level below he fell and sustained injuries to his back. Subsequent examination of the ladder revealed that a rung of the ladder was missing, resulting in a gap of 21 inches between rungs. The Trial Court found that this gap constituted

a defect in the ladder which pre-existed execution of the Master Service Contract.

Paragraph 9 of the Contract provides:

(9) Subcontractor agrees to indemnify and hold harmless Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property (including, but not limited to claims, demands, or suits for bodily injury, illness, disease, death, loss of services, maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary.

Alleging jurisdiction under the Outer Continental Shelf Lands Act, 43 USC § 1333(b), and diversity of citizenship, Mott commenced litigation against ODECO in the United States District Court for the Eastern District of Louisiana. By third party demand, ODECO sought indemnification against Mott's claim from Quality under the terms of the Master Service Contract. After trial on the merits, the third party demand was involuntarily dismissed. An appeal to the Court of Appeals for the Fifth Circuit was perfected by ODECO and the judgment of dismissal was affirmed. Petitions for rehearing being denied by the appellate court, ODECO now seeks certiorari to review the important questions of whether a standard form indemnity agreement used extensively in the Louisiana offshore oil industry is ambiguous, as found by the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION HOLDING THE INDEMNITY PROVISION OF PARAGRAPH 9 OF THE MASTER SERVICE CONTRACT AMBIGUOUS IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH CONTROLLING LOUISIANA JURISPRUDENCE.

The law of Louisiana clearly governs interpretation of the contract before the Court. 43 USC §1333(a)(2); *Rodriguez v. Aetna Cas. & Sur. Co.*, supra; see also, *Dickerson v. Continental Oil Co.*, 449 F.2d 1209, (5th Cir. 1971); *Day v. ODECO*, 353 F.Supp. 1350 (E.D.La. 1975). Equally evident, that law holds contractual language such as that involved here unambiguous and enforceable according to its tenor.

There are three cases in the Louisiana State jurisprudence which involve indemnity provisions which include express language by which the indemnitor agrees to indemnify even for the indemnitee's own negligence. Unlike the case at bar, all other Louisiana cases, including those cited by the Fifth Circuit, deal with indemnity stipulations lacking reference to the indemnitee's negligence and the question posed is whether other terms of the stipulation unambiguously require indemnification when the indemnitee is negligent. In the three apposite cases the courts encountered no such issue.

The earliest of the factually apposite cases, *Hospital Service District No. 1 v. Delta Gas, Inc.*, 171 So.2d 293 (La. App. 1965), brought before the court the provisions of the indemnitor's insurance policy which provided coverage of the insured's indemnity contract "without regard to negligence" and the actual contract to indemnify. The court found the accident made the basis of the litigation "clearly within the protective scope" of the obligation assumed by the indemnitor and its insurer. Though the case does not clearly dispose of the issue presented here, it is important because of the distinction it draws between indemnity provisions comprehending the indemnitee's negligence and those which do not. The indemnitors, as did the Fifth Circuit in the instant case, relied upon *Buford v. Sewerage and Water Bd. of New Orleans*, 175 So. 110 (La. App. 1937), to support a contention that the indemnity obligation was ambiguous. The Court dismissed this contention summarily:

> There are two important distinguishing features between the Buford case and the instant case: (1) . . . (2) In the Buford case there was no agreement on the part of the insurer comparable to

> Liberty Mutual's (insurer's) endorsement agreeing to protect Pittman (indemnitee) "without reference to negligence." (Descriptive terms in parentheses added.) *Hospital Services District No. 1 v. Delta Gas, Inc.*, supra at 300.

Louisiana law, therefore, is to the effect that indemnity stipulations which include an assumption of the indemnitee's negligence are distinguishable from those in which such an undertaking is not expressed. See: *Arnold v. Stupp Corp.*, 204 So.2d 797 (La. App. 1967). Yet, each Louisiana case relied on by the Fifth Circuit to support its finding of ambiguity is of the distinguished type. See, *Brown v. Seaboard Coast R.R.Co.*, 554 F.2d 1299 (5th Cir. 1958); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958); *Green v. Taca International Airlines*, 304 So.2d 357 (La. 1974); *Arnold v. Stupp Corp.*, supra; and, *Buford v. Sewerage and Water Bd. of New Orleans*, supra.

More to the point, however, is the lack of reference by the Fifth Circuit to *Jennings v. Ralston Purina Co.*, 201 So. 2d 168 (La. App. 1967); *cert. denied* 251 La. 215, 203 So. 2d 554, the leading Louisiana case on agreement of the type before the court. In that case, a suit for damages by a contractor's employer against the contractor's customer brought forth a demand for indemnification under the following contractual provision:

> Contractor shall protect, indemnify and hold harmless Company from any loss, damage, liability and expense for all injuries, including death to persons or damage to property directly or indirectly arising or growing out of the performance

> of this Contract except loss or damage that is recoverable under Company's fire and extended coverage insurance.
>
> Contractor shall hold Company harmless from and shall answer and defend any action instituted against Company for any loss, damage or injury sustained by any person resulting from the performance of this Contract.
>
> Contractor shall carry and maintain such liability insurance as will protect Contractor and Company from claims under any workmen's compensation acts and from any other damages from personal injury, including death, which may be sustained by Contractor's workmen, sub-contractors or any of their servants, agents or employees and the general public, and from claims for property damage which may be sustained by any of them, due to the performance of this Contract. Contractor shall furnish the Company certificates that Contractor has in effect the following insurance. *Jennings v. Ralston Purina Co.*, supra at 174.

In addition to holding that a contractual stipulation providing indemnity against the indemnitee's own negligence was not contrary to the public policy of Louisiana, the court made this observation concerning provision:

> Counsel for third party defendants also urgently contends that a contract of indemnity whereby one assumes indemnification against his own negligence must be strictly construed. We have no

> quarrel with this principle. However, it matters not how strictly we construe the indemnity provision of the contract against Ralston as contractee nor how liberally we might construe the provision in favor of Efurd, the contractor, we cannot conceive of any conclusion which would detract from the clearly quoted, specifically stated and thoroughly comprehensive obligation on the part of Efurd to indemnify Ralston against *any damage or injury arising out of the performance of the contract* whether or not such damage resulted from Ralston's negligence. *Jennings v. Ralston Purina Co.*, supra at 175.

Finally, in *Polozola v. Garlock, Inc.*, 343 So.2d 1000 (La. 1977), the Louisiana Supreme Court considered an indemnity agreement which included express reference to the indemnitee's negligence. The court not only held the provision unambiguous but, more importantly, noted that the express inclusion within the stipulation of reference to the indemnitee's negligence made unnecessary consideration of whether the language "any and all losses," without more, evidenced an inequivocal intent to indemnify when the basic claim was premised upon the indemnitee's negligence.

Louisiana law, therefore, does not hold an indemnity provision such as that of paragraph 9 of the Master Service Contract ambiguous. On the contrary, such a provision is, in law, clear, specifically stated, thoroughly comprehensive and unambiguous.

Such a conclusion is also mandated by prior decisions of the federal courts sitting in Louisiana and applying Louisiana

law. These cases not only highlight the Fifth Circuit's error in finding ambiguity by analyzing the paragraph 9 indemnity provision as one involving only the phrase "any and all claims" rather than as one expressly comprehending the indemnitee's negligence and including specific qualifications to the general terms but also disclose the correct method of analysis of the provision under Louisiana law.

In *Day v. Ocean Drilling and Exploration Co.*, 353 F.Supp. 1350 (E.D. La. 1973), the same paragraph 9 indemnity clause was before the court. The complainant, while working on an ODECO fixed platform, walked past a compressor owned by ODECO which suddenly exploded and caused injuries. In concluding that ODECO was entitled to indemnification by the complainant's employer, Judge Rubin did not pause to consider whether the indemnity provision or its "lengthy string of phrases expressly refers to injuries caused" by a compressor explosion. His analysis proceeded immediately to consideration of whether the complainant's claim was related to his employer's activities aboard the ODECO platform, the type of claim unambiguously defined by the contract.

The same indemnity provision was considered in *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (5th Cir. 1975). There complainants were aboard an ODECO submersible oil storage facility and were injured when the facility was caused to shake, tilt and refloat on one side as the result of operations previously conducted by an ODECO employee. In considering the indemnity demands by ODECO against complainant's employer, Hughes, the court did not consider whether the indemnity phrase "any and all claims" could comprehend, in the abstract and under proper rules of strict construction, a claim arising in the pecu-

liar factual circumstances involved. In fact, the court proceeded directly to the issue as framed by the parties in their contract noting:

> Hughes contends that ODECO is not entitled to indemnity because the negligence was not, nor was the accident itself related in any way to the activities of Hughes as required by the indemnity paragraph. Hughes asserts that the accident arose out of activities exclusively under the control of ODECO, that there was no work of Hughes being performed at the time of the negligent acts or the occurrence of the accident, and that the accident did not occur at the place prescribed by work orders. *The interpretation which Hughes urges is too narrow. Hughes agreed to indemnify ODECO for claims for damages "incident to, arising out of, in connection with, or resulting from the activities of subcontractor ... or in connection with the work to be performed, services to be rendered, or materials to be furnished, under this contract. ..." The accident falls within the scope of the quoted language.* (Emphasis added.) *Hicks v. Ocean Drilling & Exploration Co.*, supra at 824.

Reference to other cases from the Fifth Circuit likewise reveal the error of the analysis in the instant matter. In *Dickerson v. Continental Oil Co.*, 449 F.2d 1209 (5th Cir. 1971), the indemnitor attempted to avoid its obligation to its indemnitee under a similar indemnity clause upon the argument that the clause did not apply to the particular facts of the case. The appellate court agreed with the Trial Court's interpretation of the agreement which involved an

analysis of whether the claims arose out of, incident to or in connection with the indemnitor's work under the contract. The most striking recent decision concerning indemnity agreements is *Stephens v. Chevron Oil Co.*, 517 F.2d 1123 (5th Cir. 1975). There the indemnity clause provided that the indemnitor would defend, hold harmless and indemnify the indemnitee against ". . .any loss, expense, claim or demand . . ." ". . . in any way arising out of or connected with the performance by Contractor (indemnitor) of services hereunder." The court held that this phraseology clearly defined the indemnity obligation under appropriate rules of contract interpretation. Specifically, the court stated:

> When interpreting a written agreement under the law of Louisiana, it is clear that the intent of the parties is of paramount importance. Such an agreement must be construed in accordance with the plain, ordinary and popular sense of the language. Texaco, Inc. v. Vermillion Parish School Board, 244 L. 408, 152 So.2d 541, 548 (1963); Sabine Construction Co. v Cameron Sewerage District No. 1, 289 So.2d 319, 325 (La. Ct. App. 1974). Under these rules of construction, the contract between Chevron (indemnitee) and Axelson (indemnitor) clearly created a duty on the part of Axelson to defend and hold Chevron harmless against the claim of Stephens, if it in any way arose out of or was connected with Axelson's services to Chevron. *Stephens v. Chevron Oil Co.*, supra at 1125.

Perhaps the most telling analysis of such agreements if the Fifth Circuit's recent observation in *Cormier v. Rowan Drilling Co.*, 549 F.2d 963 (5th Cir. 1977). In connection with

an indemnity agreement of slightly different conception than that at issue, this court noted that:

> In the most specific detail, which writes over or around any possible tort or maritime theory, . . . the contract identifies percisely the respective indemnity obligations between the parties to the contract with respect to the employees of each. *Cormier v. Rowan Drilling Co.*, supra at 970.

The same result should flow from the ODECO-Quality indemnity provision which "writes over or around" theories of liability or factual circumstances and bases the indemnity obligation on the fact that the claim for which indemnity is sought relates to the activity or work of the indemnitee for the indemnitor. The same point was made in *Tidewater Oil Co. v. Travelers Insurance Co.*, 468 F.2d 985 (5th Cir. 1972). The court, in holding the factual circumstances giving rise to the action irrelevant, noted:

> By its emphasis upon Smith's status as a borrowed servant of Tidewater, and the lack of independent contractor status of Smith, the District Court in effect bypassed the question of whether the arrangement was intended to be independent of status and to relieve the regular user of contract labor from the very sort of argument over status which has arisen in this case. *Tidewater Oil Co. v. Travelers Insurance Co.*, supra at 988.

Two recent cases from the Louisiana Supreme Court confirm the correctness of the Fifth Circuit's earlier reasoning. In *Chaney v. Travelers Insurance Co.*, 259 La. 1, 249 So.2d 181 (La. 1971), the indemnity clause provided:

> It is further agreed that the contractor shall hold owner free and harmless from all claims or damages to persons and/or property that may arise out of or by reason of the performance of the work . . . . . *Chaney v. Travelers Insurance Co.*, supra at 187.

The court summarily found that since the basis for the original claim was the legal obligation of the owner/indemnitee for claims arising out of the work performed by the indemnitor, the clause compelled indemnification. Similarly, as previously noted, the Louisiana Supreme Court, in *Polozola v. Garlock, Inc.*, supra, analyzed a similar indemnity agreement in a manner consistent with the foregoing federal cases and, in fact, found inappropriate the type of analysis employed by the Fifth Circuit in this case.

ODECO respectfully submits that a Writ of Certiorari should be granted to resolve this direct conflict between controlling state precedent and the decision of the Fifth Circuit.

II.

THE COURT OF APPEALS DECISION HOLDING THE INDEMNITY PROVISION OF PARAGRAPH 9 OF THE MASTER SERVICE CONTRACT AMBIGUOUS RELIES UPON TEXAS RULES OF CONTRACT INTERPRETATION THEREBY CREATING A DIRECT CONFLICT WITH FEDERAL STATUTES AND DECISION OF THIS COURT.

The artificial island or fixed structure upon which the accident forming the factual basis for this litigation occurred was located on the Outer Continental Shelf off the coast of Loui-

siana. Clearly, under the Outer Continental Shelf Lands Act, 43 USC § 1333(a)(2) and this court's decision in *Rodriguez v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969), Louisiana law of contract interpretation is applicable, as surrogate federal law, in determining the indemnity obligations arising from paragraph 9 of the Master Service Contract.

Yet, in holding that indemnification under paragraph 9 was not due because the accident from which the suit originated was not "incident to, arising out of, in connection with or resulting from the activities of Subcontractor (Quality), its employees and agents . . ." the Fifth Circuit relied solely upon Texas principles of contract interpretation emanating from *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969); and, *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287 (5th Cir. 1963). Under Texas rules, interpretation of the phrases "incident to, arising out of, in connection with or resulting from" is different from that required by Louisiana rules. The Texas principles are summarized by the *Martin Wright* court as follows:

> . . . the negligent acts or omissions, are examined by the Court to determine if they had any connection with, involvement with, or relation to the performance of the work of the indemnitor. If they had none, the injuries are not considered as having any "connection with" the work, "arising out of" it, or "resulting from" it . . . . *Martin Wright Electric Co. v. W. R. Grimshaw*, supra at 385.

Louisiana principles mandate a different result. In *Dickerson v. Continental Oil Co.*, supra, the court approved the following observation of the Trial Court:

> The indemnification agreement did not say that it covered only work that was to be done by the contractor, but rather incident to or growing out of the work done under the contract. All of the work on the platform at the time of the fire was work arising out of or incident to this contract .. *Dickerson v. Continental Oil Co.*, supra at 1221.

Similarly, in *Hicks v. Ocean Drilling & Exploration Co.*, the court noted:

> Hughes contends that ODECO is not entitled to indemnity because the negligence was not, nor was the accident itself, related in any way to the activities of Hughes as required by the indemnity paragraph. Hughes asserts that the accident arose out of activities exclusively under the control of ODECO, that there was no work of Hughes being performed at the time of the negligent acts or the occurrence of the accident, and that the accident did not occur at a place prescribed by work orders. The interpretation which Hughes urges is too narrow. Hughes agreed to indemnify ODECO for claims for damages "incident to, arising out of, in connection with, or resulting from the activities of subcontractor . . . or in connection with the work to be performed, services to be rendered, or materials to be furnished, under this contract. .. " The accident falls within the scope of the quoted

language. *Hicks v. Ocean Drilling & Exploration Co.*, supra at 824.

Likewise, in *Stephens v. Chevron Oil Co.*, the Fifth Circuit noted that "all that is required to trigger the indemnity provision is that the loss, expense, claim or demand arise out of the contractual performance of the contractor-indemnitor."

That these expressions of Louisiana law by the Fifth Circuit are correct is clearly demonstrated by the decisions of Louisiana courts in *Hospital Service District No. 1 v. Delta Gas, Inc.*, supra; *Jennings v. Ralston Purina Co.*, supra; *Chaney v. Travelers Insurance Co.*, supra; and, *Polozola v. Garlock, Inc.*, supra.

It is respectfully submitted that in holding reference to the alleged negligent act or omission was relevant, under the indemnity agreement, in determining whether the accident forming the basis for this litigation was related to the indemnitor's work so as to activate the indemnity obligation the Court of Appeals applied law which was inapplicable, under statute and decisions of this Court, requiring that a writ of certiorari issue so thus the conflict created may be resolved.

CONCLUSION

This Petition calls for clarification of issues important to the vital offshore oil and gas industry and resolution of conflicts between controlling precedent and the decision of the Court of Appeals for the Fifth Circuit. Ocean Drilling and Exploration Company respectfully submits that certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for petitioner has caused three copies of the foregoing Petition for Writ of Certiorari to be served on Lawrence E. Abbott, Herbert, Abbott & Horack, 515 International Trade Mart, New Orleans, Louisiana 70130; and Joseph J. Weigand, Post Office Box 6062, Houma, Louisiana 70361, by placing same in the U.S. Mail, First Class, postage prepaid, this 7th day of December, 1978.

W. K. CHRISTOVICH

APPENDIX A

Excerpts from Transcript of Proceedings held
September 8th and 9th, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROY A. MOTT	CIVIL ACTION
VS	NO. 74-1964
ODECO, HIGHLANDS INSURANCE CO.,QUALITY EQUIPMENT, INC., and HARTFORD ACCIDENT & INDEMNITY CO.	SECTION "F"

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause held in the Courtroom, 400 Royal Street, New Orleans, Louisiana, on the 8th, and 9th days of September, 1975, before the HONORABLE LANSING L. MITCHELL, District Judge, presiding.

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REPORTED BY:

VICTOR D. DiGIORGIO,
Official U.S. Court Reporter.

THE FOLLOWING IS AN EXCERPT FROM THE TRANSCRIPT OF THIS MATTER, PAGES 401 THRU 408

THE COURT:

All right. I will take that motion under submission.

Do you have a motion?

MR. ABBOTT:

If the Court is going to decide, I don't know whether a motion is appropriate.

THE COURT:

Go ahead with your motion.

I will tell you, I've made up my mind about this contract. I don't need a jury advisory opinion. I decide the third-party, and it's up to the judge. It's not up to the lawyers to get an advisory opinion from the jury, it's up to the judge as to whether or not the judge wants an advisory opinion from the jury. I have heard enough about this contract, I don't need an advisory opinion from the jury.

Make your motion.

MR. ABBOTT:

Well, I was going to move for a directed verdict, but you have taken it away from the jury, so now I guess I can't.

As of this morning, you said it was going to the jury.

THE COURT:

Well, I have changed my mind.

MR. ABBOTT:

I would like to note an objection for the record to that change in mind.

THE COURT:

You can move for a directed verdict and you can move for a summary judgement.

MR. ABBOTT:

Well, that's what I'm going to do, and I would also like to note an objection to the fact that the case has been presented to the jury through the Court's orders, through the Court's instructions to sit in an advisory capacity, and now it's being taken back from them.

THE COURT:

All right.

MR. ABBOTT:

Notwithstanding that, on behalf of Quality Equipment, I now move the Court for a summary judgement based on the third-party complaint filed by ODECO against Quality Equipment. One, on the grounds that they haven't put on any case to start with. Two, I rest my case on the contract and on the evidence, uncontroverted evidence put on and just testified to by Mr. Harding.

We further ask the Court and further suggest to the Court that there is also prevailing jurisprudence in the State of Louisiana in which, when a contract is controverted or a contract is under attack, during a trial, an inference can be drawn, a prejudicial inference can be drawn against a party such as ODECO, who fails to bring into Court the party that signed the contract for that company.

The man that signed my contract has sat here for two days in Court. Doc Laborde is still up in ODECO's building on Canal Street. He didn't come down here, and they're content to sit on the contract. It has never been applied to the facts such as these, but instead it has only been applied to facts with the negligence and fault of the contractor or the subcontractor that took place months after the execution of the contract.

I further point out to the Court that in our pre-trial memorandum and in our supplemental pre-trial memorandum and our second supplemental pre-trial memorandum and in our rebuttal memorandum, all submitted to the Court, we have cited jurisprudence which clearly shows that there's no way we're supposed to be held liable, your Honor, to indemnify somebody who's far back in the history, and I will again cite to you the same example I did during our argument away from the jury.

If you, as an individual, as Judge Mitchell, goes to State Farm to take out insurance today, you sign an insurance policy, you pay your premium, and then you tell State Farm that you had a wreck last week or that you did something wrong last week that would normally be covered by the

policy, they're not going to protect you. You don't insure people backwards in the time before you make the agreement, and that's what ODECO wants us to do in this case.

And, we submit, your Honor, further, that under Article 2322, ODECO is strictly liable in this case. They are clearly under that codal provision liable about fault, and that no subcontractor entering into a contract such as this should be made to indemnify someone who has committed that fault or incurred that liability prior to the execution of the contract.

ODECO is at fault before they signed it, then they signed it, then they had an accident. Now, they're telling Quality to pay for it. It's not equitable and it's not just.

And I further point out to the Court, that ODECO has not cited one case, not one case in the year and a half this case has been in litigation to support its position. They rely on two cases, Dicks v. ODECO, Day v. ODECO, the same contract, the same law firm representing them; one difference, the fault that caused the man's accident happened months after the contract was executed and not months before as in this case, when ODECO left that defective ladder sitting out there without inspection, only to then cause injury to Roy Mott.

We respectfully move the Court for a summary judgement.

MR.CLOUTIER:

Now, in response, I will not reiterate the discussions we have had earlier this afternoon with respect to this contract.

I would point out to the Court, however, this is not an indemnity backward into history as Counsel contends. Until Mr. Mott, on August the 30th, got on that platform, ODECO had incurred nothing insofar as a responsibility or anything else. On that day, in connection with the Quality operations, a liability claim against ODECO came into existence. That is the date on which the indemnity contract, the indemnity agreement became effective. It's not going backwards into history at all, because prior to that date, there was nothing; there was no need for indemnity, nothing had happened. The claim arose during the term of the contract. How it arose is absolutely irrelevant under the terms of the indemnity agreement. Anything arising out of, incidental to, connected with the work performed is entitled to indemnity, and on that basis we submit that the motion for summary judgement should be denied.

MR. ABBOTT:

May I make one quick rebuttal comment, please?

Counsel for ODECO consistently and conveniently overlooks one point. He's done it from the first day we've had this case.

He has stipulated to the defect, they breached it before we signed it. If they breached it as we submit, your Honor, then we don't have to indemnity them because we're not bound to a provision in a breached contract. And the Lord only knows if there's ever been a breached contract in plain English and in plain photographs and in uncontroverted testimony, this was a breached contract, and we respectfully submit the indemnity provision is null and void, it is not part of any contract.

THE COURT:

All right. The contract says:

"The subcontractor agrees to indemnify and hold harmless Drilling Contractor," that's ODECO, "from and against any and all liens --" well, that's not involved here– "and against any and all claims, or suits for damages to persons," that's involved here, "which may be brought against Drilling Contractor," ODECO, "(including but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor..."

MR. ABBOTT:

Your Honor, may I make one respectful suggestion?

THE COURT:

Do you ever get through? If you will sit down I will make my findings.

MR. ABBOTT:

Please, read the part about the breach, that's our argument, of the Federal regulations.

THE COURT:

Let me start over.

"... incident to, arising out of, in connection with or

resulting from the activities of Subcontractor ..." that's Quality.

Now, in this Court's opinion, the accident involved here, resulted from a condition that pre-existed this contract. ODECO could not expect this contract to indemnify it against a condition that pre-existed this contract; further, or in connection with the work to be performed, services to be rendered or material to be furnished under this contract.

Well, the work to be performed and so forth, you didn't bring it up, but I bring it up. It was nothing in connection with the work to be performed with regard to this pre-existing rung out of that ladder, so what happened was not as a result of work to be performed. It was a result of something that pre-existed, and, as you say, the drilling contractor wasn't obligated to -- under 4, if ODECO didn't comply with OSCHA, it was not applicable to this contract.

Accordingly, the Court grants summary judgement in favor of Quality.

MR. CLOUTIER:

May I make a motion?

THE COURT:

Yes.

MR. CLOUTIER:

On the basis of the Court's ruling, I would move for a mis-

trial on the basis that all evidence presented through Mr. Harding with respect to the contract is prejudicial to this jury with respect to this case.

THE COURT:

Motion denied.

APPENDIX B

Opinion of United States Court of Appeals, Fifth Circuit

MOTT v. ODECO
Cite as 577 F.2d 273 (1978)

Roy A. MOTT, Plaintiff-Appellee,
v.

ODECO, Defendant Third-Party
Plaintiff-Appellant,

v.

QUALITY EQUIPMENT, INC., et al.,
Third-Party Defendants-Appellees.

No. 76-1177

United States Court of Appeals,
Fifth Circuit

July 28, 1978.

Rehearing and Rehearing En Banc Denied
Sept. 11, 1978.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., which directed a verdict in favor of a contractor's employee, holding the owner of an offshore oil-drilling platform strictly liable for injuries sustained by the employee

when he fell from a defective ladder joining two levels of the platform. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) because the employee's injuries did not result from the fall or collapse of any part of the oil jacket, and because the ladder, though defective, remained intact, upright and fixed in position, the employee's injuries were not occasioned by "ruin" within the meaning of the Louisiana statute imposing liability on the owner of a building for damages occasioned by its ruin; (2) parol testimony of the president of the contractor was admissible to clarify any amibguity in an indemnification provision in the master service agreement between the contractor and defendant, and (3) the findings that the defect in the ladder preexisted the execution of the contract and that the indemnification provision in the contract was not intended to include claims for injuries arising out of preexisting defects, were not clearly erroneous.

Affirmed in part; reversed in part and remanded.

1. Federal Courts 428

Louisiana law governed court action brought under Outer Continental Shelf Lands Act arising out of accident which occurred on oil production platform fixed on outer continental shelf off Louisiana shore. Outer Continental Shelf Lands Act, § 4(a)(2), 43 U.S.C.A. § 1333(a)(2).

2. Negligence 31

Fixed offshore oil-drilling platform in "building" within meaning of Louisiana statute imposing liability on owner of building for damage occasioned by its ruin due to neglect to repair. LSA-C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

3. Negligence 31

"Ruin" is prerequisite to liability under Louisiana statute imposing liability on owner of building for damage occasioned by its ruin; whether defect in premises results from "neglect to repair" or "vice in its original construction," damages must be occasioned by "ruin." LSA-C.C. art. 2322.

4. Negligence 31

"Ruin" for purposes of Louisiana statute imposing liability on owner of building for damage occasioned by its ruin, means fall or collapse of substantial component of building. LSA- C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

5. Negligence 31

Injuries sustained by welder who fell from defective ladder joining two levels of offshore oil production platform were not occasioned by "ruin" within meaning of Louisiana statute imposing liability on owner of building for damage occasioned by its ruin where welder's injuries did not result from fall or collapse, of any part of oil jacket and where ladder, though defective, remained intact, upright, and fixed in position; recovery could not be had under Louisiana statute. LSA-C.C. art. 2322.

6. Federal Courts 874

Finding, that provision of master service contract requiring contractor to indemnify owner of fixed oil-drilling platform against claims for suits for damages for bodily injury brought against owner by contractor's employees arising out of activities of contractor in connection with work to be performed under contract was not intended by parties to extend to claims for injuries caused by defects in existence on platform prior to execution of contract, was not clearly erroneous.

7. Federal Courts 874

In contractor's employee's suit to recover damages for injuries sustained when he fell from defective ladder joining two levels of defendant's offshore oil production platform, finding, that defect in ladder preexisted execution of master service contract between contractor and defendant, and that claim thus did not come within provision of agreement requiring contractor to idemnify defendant from claims for injuries to contractor's employees arising out of activities of contractor or in connection with work to be performed, under contract, was not clearly erroneous.

8. Evidence 450(7)

In action brought by contractor's employee to recover damages for injuries sustained when he fell from defective ladder joining two levels of offshore oil production platform owned by defendant, parol testimony of contractor's president was admissible to clarify ambiguity in indemnification provision of master service agreement between contractor and defendant where provision used very broad language in describing scope of contractor's obligation to indemnify defendant for claims of injuries arising out of or in connection with work to be performed under agreement, where defect in ladder was found to have preexisted execution of agreement, and where none of phrases in indemnification provision expressly referred to injuries caused by preexisting defects.

9. Indemnity 8.1(1)

Mere use of phrase "any and all claims" in indemnity clause does not suffice unambiguously to sweep within it literal reach of words used; in context of contractual indemnity provisions, use of such phrase standing alone is inadequate as matter of law to include any claim for injuries caused by negligence of indemnitee.

10. Contracts 155

Ambiguities in contracts are generally to be construed against draftsmen.

C. Edgar Cloutier, W. K. Christovich, New Orleans, La., for ODECO.

Joseph J. Weigand, Jr., Houma, La., for Roy Mott.

Lawrence E. Abbott, New Orleans, La., for Quality Equipment, Inc., et al.

Appeal from the United States District Court for the Eastern Louisiana District.

Before COWEN*, Senior Judge, GOLDBERG and AINSWORTH, Circuit Judges.

GOLDBERG, Circuit Judge:

This case originated with a suit by Roy A Mott against ODECO to recover damages for injuries sustained when Mott fell from a defective ladder joining two levels of an offshore oil production platform owned by ODECO. ODECO denied liability and, in addition, impleaded Quality Equipment, Inc. (Quality), Mott's employer on the date of the accident, claiming a right to indemnification under a provision of the Master Service Agreement between the two companies.

The district court granted a directed verdict in favor of Mott, holding that ODECO was strictly liable to Mott under Article 2322 of the Louisiana Civil Code and that contributory negligence was not a defense to a claim under this article. Neither Mott's claim based on negligence nor ODECO's defense of contributory negligence was submitted to the jury. The jury considered only the quantum of damages.

ODECO's third-party claim against Quality was tried to the court. [1] The court held that Quality's duty to indemnify did not extend to claims for injuries caused by defects in existence prior to execution of the contract. Finding that the defect in the ladder, a missing rung, was of this character, the

1. Apparently, it was originally intended that the jury impaneled to hear Mott's claim sit as an advisory jury on the indemnity claim. Thus, the opening arguments to the jury included previews of the evidence relevant to the indemnity claim. At the close of all the evidence, however, the judge determined that the jury's assistance would not be necessary and decided the indemnity issues without referring them to the jury. Neither ODECO nor Quality complains of this on appeal.

* Senior Judge, United States Court of Claims.

court entered judgment on the indemnification issue against ODECO. As an alternative ground for his decision, the trial judge held that ODECO had breached the Master Service Agreement by failing to comply with a regulation promulgated by the Occupational Safety and Health Administration (OSHA) governing the maximum distance between rungs on a ladder. 29 C.F.R. § 1910.27(b)(ii).

I. *Mott's Claim Against ODECO*

On August 30, 1973, the date of the accident, plaintiff Mott was employed by Quality as a welder. He and other members of the Quality crew began work that day on a well jacket, a small, offshore production facility located in Block 119 of the Ship Shoal Area of the Gulf of Mexico. The facility had been out of production for some time and Quality was to do work necessary to bring it back into production. The structure, surrounding one wellhead, consisted of three levels. Access from the second to the third level was provided by a vertical ladder constructed of pipe.

Mott and the other crew members arrived on the platform about mid-morning. They ascended from the bottom, or boat landing level, to the top level where they worked until lunch hour. Lunch was to be served on board the boat. As Mott was descending by ladder from the third deck to the level below, he fell, sustaining serious injuries to his back. Subsequent examination of the ladder revealed that a rung of the ladder was missing, resulting in a gap of 21 inches between rungs located several feet above the deck.

[1,2] Mott argues that the strict liability rule of Article 2322 of the Louisiana Civil Code is applicable to the facts at

bar.[2]
That article provides:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

We recently have had occasion to consider the import of this statute in detail. *Moczygemba v. Danos & Curole Marine Contractors*, 561 F.2d 1149 (5th Cir. 1977). There we stated that the "existence of a 'building' and its 'ruin' are the threshold requirements of Article 2322." *Id.* at 1151.[3]

> Once the "building" criterion is met, in order for liability to attach under Article 2322 the damage complained of must have been caused by "ruin." "Ruin" for purposes of Article 2322 means the fall or collapse of a substantial component of the structure resulting from a "neglect to repair." . . .[5]Under Louisiana law the owner, here Defendant, is subject to liability without fault for all damages occasioned by a defective condition on the premises but only for *damage occasioned by* "ruin."

Id. at 1151-52 and n.5.

[3,4] Our thorough review in *Moczygemba* of the governing Louisiana law thus establishes two propositions. First, "ruin" is a prerequisite to liability under Article 2322. Whether the defect in the premises results from "neglect to repair" or a "vice in its original construction," the damages must be occasioned by "ruin." Second, "ruin" for purposes of Article 2322 means the fall or collapse of a substantial component of the building.[4] While there have been some contrary indications in Louisiana jurisprudence, *see e.g.*, *Fontenot v. Sarver*, 183 So.2d 75 (La.App.1966); *Murphy v. Fidelity & Casualty Co. of N.Y.*, 138 So.2d 132 (La.App. 1962), *Moczygemba's* understanding of the "ruin" requirement is clearly supported by the most recent pronouncement of the Louisiana Supreme Court on the subject. See *Davis v. Royal-Globe Insurance Co.*, 257 La. 523, 242 So.2d 839 (1971). In *Davis*, the plaintiff sought to recover damages for the lead poisoning of her children resulting from their ingestion of paint flakes which had fallen from the walls and ceilings of the defendant's apartment building. After reaffirming that "ruin" must involve "fall or collapse" of a substantial component of the building, the court held that "fall-

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2. Louisiana law governs this tort action brought under the Outer Continental Shelf Lands Act. 43 U.S.C. § 1333(a)(2). *Moczygemba v. Danos & Curole Marine Contractors*, 561 F.2d 1149, 1151 and n.1 (5th Cir. 1977).

3. There is no question that the "building" requirement is satisfied in this case. A fixed offshore oil and drilling platform is a "building" within the meaning of Article 2322. *Moczugemba v. Danos & Curole Marine Contractors supra*, 561 F.2d at 1151; *McIllwain v. Placid Oil Co.*, 472 F.2d 248 (5th Cir. 1973), *cert. denied*, 412 U.S. 923, 93 S.Ct. 2734, 37 L.Ed.2d 150 (1973).

5. Article 2322 also provides for recovery if the "ruin" is occasioned by a "vice in its original construction."

4. *McIllwain v. Placid Oil Co.*, 472 F.2d 248 (5th Cir. 1973) is not to the contrary. The very first sentence of the *McIllwain* opinion makes it obvious that there was "fall or collapse" in that case.

> In December of 1969 Lankford McIllwain unexpectedly plummeted into the Gulf of Mexico and was seriously injured when a section of the grated deck of an offshore drilling platform upon which he was working gave way beneath his feet.

Id. at 249. (Emphasis added.)

ing paint flakes from an apartment ceiling were never intended by this article [2322] to be considered the "ruin" of a building . . .." *Id.* at 842.

[5] These principles compel reversal of the judgment in favor of Mott. The undisputed facts show that Mott's injuries did not result from the fall or collapse of any part of the oil jacket. The ladder, though defective, remained intact, upright, and fixed in position. Since Mott's injuries were not occasioned by "ruin" and since "ruin" is a prerequisite to any recovery under Article 2322, the judgment must be reversed and the case remanded for trial on Mott's alternate theories of liability.

II. *ODECO's Claim Against Quality*

ODECO's claim for indemnity against Quality rests on paragraph 9 of the Master Service Contract between the two companies, executed on August 11, 1973.[5] Paragraph 9 provides:

> (9) Subcontractor agrees to indemnify and hold harmless Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property (including, but not limited to claims, demands, or suits for

5. We reach this issue notwithstanding our determination that the judgment in favor of Mott must be reversed. The issues pertaining to the indemnity claim have been fully litigated below and on appeal. They will certainly arise again on remand if Mott prevails on his alternate theory of liability. Indeed, since ODECO's third-party complaint demands indemnification for costs and attorney's fees, the issue may well have to be met even if Mott does not recover. *See Brown v. Seaboard Coast Line R.R. Co.*, 554 F.2d 1299 (5th Cir. 1977) (judgment entered against plaintiff in trial court; defendant/third-party plaintiff claimed and recovered costs and attorney's fees under indemnity clause of contract). In the interests of judicial economy, we consider the third-party claim on this appeal.

> bodily injury, illness, disease, death, loss of services, maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary.

At trial, Quality contended that this provision did not obligate it to indemnify ODECO on Mott's claim. Quality argued that paragraph 9 did not extend to coverage of accidents caused by ODECO's negligence with respect to defects pre-existing execution of the contract. Contending that paragraph 9 was ambiguous with respect to such accidents, Quality offered the testimony of its president, Max Harding. Harding was permitted to testify over ODECO's objection. The essence of his testimony was that the parties did not intend to provide indemnification for claims arising from pre-existing defects. ODECO offered no contrary testimony. The district judge, sitting as the trier of fact on this aspect of the case, found that the parties did not intend to includ claims of this character within the ambit of Quality's obliga-

tion to indemnify ODECO. Finding further that the defect in the ladder pre-existed execution of the Master Service Contract, the court held that Quality was under no obligation to indemnify ODECO on Mott's claim.

[6-9] We find no error here requiring reversal. The trial court ruled correctly that the parol testimony of Harding was admissible to clarify an ambiguity in the contract. While it is true that paragraph 9 uses very broad language in describing the scope of Quality's obligation and purports to be a cosmic clause, none of paragraph 9's lengthy string of phrases expressly refers to injuries caused by pre-existing defects. The mere use of the phrase "any and all claims" in an indemnity clause does not suffice unambiguously to sweep within it the literal reach of the words used. *See Brown v. Seaboard Coast R.R. Co.*, 554 F.2d 1299, 1302 and n.3 (5th Cir. 1977); *see also Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410, 414 (5th Cir. 1958) ("it is an area in which to cover *all* does not include one of the parts") (emphasis in original). Indeed, in the context of contractual indemnity provisions, the use of such a phrase standing alone is inadequate as a matter of law to include any claim for injuries caused by the negligence of the indemnitee. *See, e.g., Green v. Taca International Airlines*, 304 So.2d 357, 361 (La. 1974) (contract of indemnity will not be construed to indemnify indemnitee against losses resulting to him through his own negligence, where such intention is not expressed in unequivocal terms); *Arnold v. Stupp Corp.*, 204 So.2d 797 (La.App. 1967) ("any and all liability"); *Buford v. Sewerage and Water Bd. of New Orleans*, 175 So.110 (La.App.1937) ("all suits or actions of any name or description"). While paragraph 9 of the Master Service Contract does expressly require Quality to indemnify ODECO for losses caused by ODECO's own negli-

gence, the rule of construction adopted in these cases precludes us from holding paragraph 9 unambiguous with respect to a particular subclass of claims simply because the phrase "any and all claims" is employed.

The phrase "any and all claims" is, moreover, qualified by the requirement that the claims be "incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents . . .." These qualifiers, while hardly words of limitation, do admit of interpretation and sometimes subtle distinction. *See, e.g., Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969); *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287 (5th Cir. 1963). In *Martin Wright*, we reversed the district court's grant of summary judgment in favor of Grimshaw, the indemnitee. Wright, the indemnitor, had been hired by Grimshaw to oomplete certain electrical work. Customarily, Wright's employees devoted the last fifteen minutes of their working time to storing their tools. As one of the employees, Zoller, left the tool shed area, he tripped on some wire mesh and fell onto a metal dowel which pierced his eye. Zoller died as a result of the injury. At issue was the correct construction of an indemnity contract that required indemnification for any claim "arising out of or resulting from the performance by the subcontractor of the work covered by this subcontract." We held that no indemnity was due since the injury was caused by Grimshaw's negligence in inadequately lighting the area and maintaining an unsafe work area. Since this negligence had no "relation to, connection or involvement with" Wright's electrical work, the claim did not "arise out of or result from" Wright's performance of its duties. 419 F.2d at 1386-87. Quality's argument here obviously parallels the indemnitor's argument in *Martin Wright*.

ODECO's negligence, if such it was, with respect to the ladder had no relation to Quality's work aboard the platform. The interpretation we required in that case can hardly be termed so implausible on the facts of this case that parol evidence to support it is inadmissible.

[10] As noted earlier, the only testimony bearing on this question was that of Quality's president, Max Harding. He testified that the parties did not intend to cover injuries caused by pre-existing defects. The district judge credited Harding's testimony and construed paragraph 9 in accordance with it. The court's understanding is supported by the rule that ambiguities in contracts are generally to be construed against the draftsman, here ODECO. *Kuhn v. Stan A. Plauche Real Estate Co.*, 249 La. 85, 185 So.2d 210 (1966); *W.N. Bergeron & Sons v. Caldwell Sugar Co-Op. Inc.*, 340 So.2d 1054 (La.App.1976). While another view of the parties intentions would have been permissible, *see Day v. ODECO*, 353 F.Supp. 1350 (E.D.La. 1973), we cannot say on the basis of this record that the trial court's view of the parties' intention is clearly erroneous. Since the court's further finding, that that the defect in the ladder pre-existed execution of the contract, is not clearly erroneous, the district court's ruling on the third-party claim must be affirmed.[6]

6. In view of our resolution of the third-party claim, we need not reach Quality's second defense to ODECO's claim, i.e., that ODECO breached the Master Service Contract by failing to comply with an OSHA standard governing the distance between rungs on a ladder. There is sharp disagreement between the parties as to the applicability of OSHA regulations to fixed platforms on the Outer Continental Shelf. ODECO contends that regulations promulgated by the Secretary of Labor under OSHA are inapplicable since such regulations are not to apply to "working conditions" with respect to which other agencies "exercise" regulatory authority, 29 U.S.C. § 653(b)(1). The Coast Guard, ODECO asserts, exercises such authority over fixed platforms on the Outer Continental Shelf. See 43 U.S.C. § 1333(e); 33 C.F.R. § 143 (1977). Quality, pointing out that the Coast Guard has issued no regulations concerning the safety of ladders on fixed platforms, contends with equal vigor that the Coast Guard has not "exercised" its authority with respect to the particular "working condition' in question. Absent such exercise, OSHA standards must apply, says Waulity, since OSHA specifically provides that it shall be applicable to the Outer Continental Shelf lands. See 29 U.S.C. § 653(a).

These arguments present questions of considerable difficulty, complexity, and refinement. Our leading case on the displacement of OSHA standards elaborates an approach quite sensitive to nuance. *See S. Pac. Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976). We doubt seriously that these issues can be adequately addressed and correctly resolved in the context of this dispute between two private parties and in the absence of both of the two public agencies primarily interested. *Cf. Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119 (2d Cir. 1978) (refusing to decide whether regulations of Federal Aviation Administration displaced OSHA standards until fully adequate administrative record developed). Since our disposition of the indemnity claim on other grounds makes it unnecessary to reach the question of the OSHA standards' applicability, we express no views whatsoever on this question.

III. *Conclusion*

The judgment in favor of Mott against ODECO is therefore REVERSED and the case REMANDED for a new trial. The judgment against ODECO on its third-party claim against Quality is AFFIRMED.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76 - 1177

D.C. Docket No. CA 74 - 1964 "F"

ROY A. MOTT, Plaintiff-Appellee

versus

ODECO, Defendant Third Party Plaintiff-Appellant

versus

QUALITY EQUIPMENT, INC., ET AL., Third Party Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before COWEN*, Senior Judge, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the judgment of the said District Court against ODECO on its third-party claim against Quality is hereby affirmed; the judgment in favor of Mott against ODECO is reversed; and that this cause be, and the same is hereby remanded to the said District Court for a new trial in accordance with the opinion of this Court;

It is further ordered that ODECO pay Quality Equipment the costs on appeal to be taxed by the Clerk of this Court, and that Mott pay one-half of ODECO's said costs.

July 28, 1978

Issued As Mandate: Sep 19 1978

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*Senior Judge, United States Court of Claims.

APPENDIX D

Order Denying Petition for Rehearing

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 11, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76 - 1177 - ROY A MOTT Versus ODECO Versus QUALITY EQUIPMENT

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, * and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By: s/ Brenda M. Hauck
Deputy Clerk

*On behalf of Appellant, Odeco,

BH

cc: Messrs. C. Edgar Cloutier
W. K. Christovich
Mr. Joseph J. Weigand, Jr.
Mr. Lawrence E. Abbott
Mr. Earl G. Pitre

APPENDIX E

Service Contract

SERVICE CONTRACT

This agreement entered into this 11th day of August, 1973, by and between OCEAN DRILLING & EXPLORATION COMPANY (hereinafter referred to as "ODECO" and QUALITY EQUIPMENT, INC. (hereinafter referred to as "CONTRACTOR"):

WITNESSETH: THAT

WHEREAS, Contractor is engaged in the business of supplying contract labor, welders, and equipment for drilling, construction, maintenance, installation and otherwise servicing oil and gas wells and related production equipment, facilities and installations, and:

WHEREAS, ODECO and any of its affiliates and subsidiaries, from time to time, may desire such services of Contractor with respect to oil and gas wells and related production equipment, facilities and installation operated by ODECO.

NOW THEREFORE, in consideration of the promises and the other considerations herein contained, it is agreed as follows:

1. This agreement shall govern, control and apply to services which may be requested by ODECO and performed by Contractor, including but not limited to furnishing contract

labor and welding services but shall not be applicable in those instances for which bids are solicited for a particular job. Prior to commencement of work on a particular job, ODECO will execute a service order in the form of Exhibit "A", attached hereto, which will specify the location and description of work to be performed, the items of services, materials and equipment to be furnished by each party.

2. This agreement shall continue in effect for a period of twelve (12) months from the date first hereinabove written notwithstanding the provisions of Article 1 (c) of Exhibit "C", except ODECO may earlier terminate this agreement if it is not satisfied with the work performed by Contractor hereunder by first giving Contractor notice of any deficiencies and if in a reasonable time Contractor has not corrected the said deficiencies.

3. During the twelve (12) month period beginning with the date hereof ODECO agrees, insofar as possible and practicable, to select Contractor to perform for ODECO one hundred percent (100%), based on dollar value, of ODECO's requirements for the kind and type of piece work contemplated hereunder.

4. All work performed, services rendered, and materials furnished for ODECO by Contractor and remunerations made to Contractor by ODECO under the terms of this contract shall be based on the rates set out in Exhibit "B" attached hereto, which rates shall be firm for the length of this contract, and in addition to the rates set out in Exhibit "B", the Contractor shall grant to Odeco a discount of fifteen (15%) of the said rates for all work performed for ODECO. The said fifteen percent (15%) discount shall not apply to

services, rentals, materials or crafts furnished by third parties, which will be charged at actual cost plus fifteen percent (15%).

5. Attached hereto as Exhibit "C" is a Master Service Contract which Exhibit "C" is incorporated herein as if set out in full and the parties hereto agree that simultaneous with the execution of this agreement they shall also execute Exhibit "C" and said Exhibit "C" shall be in lieu of and will supersede any Master Service Contracts that may have been executed in the past by the parties hereto and all work performed hereunder contemplated by this agreement shall be performed subject to the said Exhibit "C".

6. All notices to be given under this contract shall be in writing and shall be sent to Contractor at P.O. Box 190, Houma, Louisiana 70360, and to ODECO at P.O. Box 61780, New Orleans, Louisiana 70161.

7. The terms and conditions of this contract, together with the applicable Exhibits "A", "B" and "C" attached hereto shall apply and be controlling in determining the rights and liabilities of the parties hereto. This agreement may be amended, modified or otherwise altered only by instrument in writing signed by duly authorized representative of each party.

8. This agreement shall inure to the benefit of and be binding upon the parties hereto, their respective successors, representatives and assignees, provided, however, that Contractor shall not assign this contract in whole or in part of any specific work or service thereunder without ODECO's prior written consent. ODECO'S consent to any such assignment shall not relieve Contractor of its obligations hereunder.

It is agreed, however, that Contractor shall retain the right to assign all or any part of the remuneration due or which may become due by virtue of work performed under this contract.

9. If there is a conflict between this agreement and any of the Exhibits attached hereto, this agreement shall control.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first herein set forth.

WITNESSES:
s/ Lewis H. Pitman OCEAN DRILLING & EXPLORATION COMPANY

M. Wilkinson BY: s/ (Signature illegible)

CONTRACTOR
QUALITY EQUIPMENT, INC.

s/ Debbie Ortega

s/ Vernon C. King, Jr. BY: s/ (Signature Illegible)

* * * * * * *

EXHIBITS "A" AND "B" ARE OMITTED

* * * * * * *

Exhibit "C"
ODECO
Ocean Drilling & Exploration Company

MASTER SERVICE CONTRACT

THIS AGREEMENT, made and entered into this day of , A.D., 19 , by and between OCEAN DRILLING & EXPLORATION COMPANY - P.O. Box 61780, New Orleans, Louisiana 70160 hereinafter called "Drilling Contractor", and QUALITY EQUIPMENT, INC., Post Office Box 190, Houma, Louisiana 70360 hereinafter called "Subcontractor",

WITNESSETH: THAT

WHEREAS, Drilling Contractor is engaged in the business of drilling exploratory and development wells seeking oil and gas or other minerals for itself or for the account of others; and,

WHEREAS, Drilling Contractor or other parties for whom or with whom Drilling Contractor is working may desire the services of Subcontractor; and

WHEREAS, Subcontractor represents that it has adequate equipment in good working order and fully trained personnel capable of efficiently operating such equipment and performing services in a safe, proper and workmanlike manner for Drilling Contractor or others as aforesaid;

NOW THEREFORE:

In consideration of the mutual promises and covenants herein contained, the parties hereto mutually agree as follows:

(1)(a) This agreement shall control and govern the performance of all work by Subcontractor for Drilling Contractor under work orders, oral or written, given on or after the date hereof by Drilling Contractor to Subcontractor.

(b) With respect to any work performed by Subcontractor pursuant to contracts or work orders with parties other than Drilling Contractor on any drilling barges, vessels, platforms, installations or other property of any kind owned by, leased to, chartered to, or under the control of Drilling Contractor, Sections 8, 9, 10 and 11 of this contract shall be applicable as between Subcontractor and Drilling Contractor with respect to the work so performed.

(c) This agreement shall remain in effect until canceled by either party by giving the other party days written notice to that effect at the respective addresses herein set forth; provided, however, that with respect to any work in progress as of the date of the cancellation, this agreement shall continue in effect until the work be completed.

(2) Upon the acceptance by Subcontractor of any work order for services and/or equipment, Subcontractor will furnish same at the time agreed upon, and continue operations diligently and without delay, in a safe, proper and workmanlike manner, in strict conformity with the specifications and requirements contained herein and in such work order, subject however, to paragraphs 3, 4 and 5 hereof.

(3) This Contract does not obligate Drilling Contractor to order work and/or equipment or materials from Subcontractor, nor does it obligate Subcontractor to accept such orders, but it, together with any applicable work order, shall control

and govern all work accepted by Subcontractor and shall define the rights and obligations of Drilling Contractor and Subcontractor, during the term hereof.

(4) Drilling Contractor and Subcontractor respectively agree to comply with all laws, rules and regulations, Federal, State and municipal, which are now or may become applicable to operations covered by this Agreement and any work order issued in connection herewith. If any of the terms hereof are in conflict with any applicable rule, regulation, order or law of a State or Federal Regulatory Body, the terms of this Contract so in conflict shall not apply and the applicable State or Federal rule, regulation, order or law shall prevail.

(5) Neither Drilling Contractor nor Subcontractor shall be liable to the other for any delays or damages or any failure to act due, occasioned, or caused by reason of Federal or State laws or the rules, regulations or orders of any public body or official purporting to exercise authority or control respecting the operations covered hereby, including the use of tools and equipment, or due, occasioned, or caused by strikes, action of the elements, or causes beyond the control of the parties affected hereby, and delays due to the above causes, or any of them, shall not be deemed to be a breach of or failure to perform under this Agreement.

(6) The Drilling Contractor shall pay Subcontractor for the work and/or equipment or materials furnished by Subcontractor at the rate stipulated in the work orders provided for herein, subject to same being accepted by Drilling Contractor as fully complying with all the terms, conditions, specifications and requirements of this Contract and such work orders; provided, Subcontractor shall have satisfied

Drilling Contractor that there are no liens or claims on or against Drilling Contractor or its property by reason of the operations of Subcontractor hereunder.

(7) Delivery tickets covering any materials or supplies furnished by vendors for which Drilling Contractor is obligated to reimburse Subcontractor, shall be turned in to Drilling Contractor as received. The quantity, descrption, and condition of materials and supplies so furnished shall be verified and checked by Subcontractor, and such delivery tickets shall be properly certified as to receipt by Subcontractor's representative.

(8) At any and all times during the term of this Agreement, Subcontractor agrees to carry insurance of the types and in the minimum amounts as follows:

(a) Workmen's compensation insurance in full compliance with all applicable State and Federal laws and regulations.

(b) Employers' liability insurance in the minimum limits of $100,000.00 per accident covering injury or death to any employee which may be outside the scope of the workmen's compensation statute of the state in which the work is performed.

(c) Comprehensive general liability insurance with minimum limits of $100,000.00 for injury to or death of any one person and $500,000.00 for any one accident and with minimum limits of $300,000.00 for property damage. Such insurance shall additionally cover the contractual liabilities and indemnities herein assumed by Subcontractor with minimum limits of $500,000.00.

(d) Automobile liability insurance covering owned, non-owned, and hired automotive equipment with minimum limits of $100,000.00 for injury to or death of any one person and $300,000.00 for any one accident and $100,000.00 property damage.

(Add Marine Insurance clause if required.)

(e) Other insurance for offshore operations as required by Ocean Drilling & Exploration Company

(f) All such policies shall be carried in a company or companies acceptable to Drilling Contractor and shall be maintained in full force and effect during the term of this agreement and shall not be canceled, altered or amended without 10 days prior written notice having been furnished to Drilling Contractor. All policies of Subcontractor, whether specifically mentioned above or not, shall be endorsed to waive Subrogation against Drilling Contractor and against all parties for whom Drilling Contractor may be working, with the exception of Workman's Compensation insurance but including all insurance carried by Subcontractor protecting against loss of or damages to its property and equipment employed in the performance of any work order issued hereunder. Subcontractor agrees to furnish Drilling Contractor with a certificate or certificates evidencing insurance coverage in accordance with the above requirements and upon request to furnish Drilling Contractor certified copies of all such policies.

(9) Subcontractor agrees to indemnify and hold harmless Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property

(including, but not limited to claims, demands, or suits for bodily injury, illness, disease, death, loss of services, maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary.

(10) Drilling Contractor shall not be liable for damage to or destruction of Subcontractor's surface equipment or materials even though such damage may be caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants, subcontractors or otherwise or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor.

(11) Subcontractor shall report to Drilling Contractor as soon as practicable all accidents or occurrences resulting in injuries to Subcontractor's employees or third parties, or damage to property of third parties, arising out of or during the course of services for the Drilling Contractor or under contracts referred to in paragraph 1(b) above by Subcontrac-

tor or of any sub-contractor of Subcontractor, and, when requested, shall furnish Drilling Contractor with a copy of reports made by Subcontractor to Subcontractor's insuror or to others of such accidents and occurrences, including statements or any other investigative materia.

(12) Subcontractor agrees to pay all taxes, licenses, and fees levied or assessed on Subcontractor in connection with or incident to the performance of this Contract by any governmental agency and unemployment compensation insurance, old age benefits, social security, or any other taxes upon the wages of Subcontractor, its agents, employees, and representatives. Subcontractor agrees to require the same agreements and to be liable for any breach of such agreements by any of its sub-contractors. Subcontractor agrees to reimburse Drilling Contractor on demand for all such taxes or governmental charges, State or Federal, which Drilling Contractor may be required or deem it necessary to pay on account of employees of Subcontractor or its sub-subcontractors. Subcontractor agrees to furnish Drilling Contractor with the information required to enable it to make the necessary reports and to pay such taxes or charges. At its election, Drilling Contractor is authorized to deduct all sums so paid for such taxes and governmental charges from such amounts as may be or become due to Subcontractor hereunder.

(13) Subcontractor shall be an independent contractor with respect to the performance of all work hereunder, and neither Subcontractor nor anyone employed by Subcontractor shall be deemed for any purpose to be the employee, agent, servant, or representative of Drilling Contractor in the performance of any work or service or part thereof in any manner dealt with hereunder. Drilling Contractor shall have

no direction or control of the Subcontractor or its employees and agents except in the results to be obtained. The work contemplated herein shall meet the approval of Drilling Contractor and be subject to the general right of inspection for Drilling Contractor to secure the satisfactory completion thereof. The actual performance and superintendence of all work hereunder shall be by Subcontractor, but Drilling Contractor or its representatives shall have unlimited access to the operations to determine whether work is being performed by Subcontractor in accordance with all the provisions of this Contract and the work order.

(14) In addition to all other indemnifying provisions contained herein, Subcontractor represents and warrants that the use or construction of any and all tools and equipment furnished by Subcontractor and used in the work provided for herein does not infringe on any license or patent which has been issued or applied for, and Subcontractor agrees to indemnify and hold Drilling Contractor harmless from any and all claims, demands, and causes of action of every kind and character in favor of or made by any patentee, licensee, or claimant of any right or priority to such tool or equipment, or the use or construction thereof, which may result from or arise out of furnishing or use of any such tool or equipment by Subcontractor in connection with the work under this Agreement and applicable work orders.

(15) In the event there is a conflict between the provisions hereof and any papers or documents, which may have been executed or passed between the parties hereto in connection with the subject matter hereof, it is understood and agreed that the provisions hereof shall be controlling. It is expressly understood and agreed by the parties hereto that no pro-

vision of any delivery ticket, invoice or other instrument used by Subcontractor in setting forth the operations conducted hereunder shall supersede the provisions of this Agreement.

(16) Time is expressly declared to be the essence of this Contract. If either party hereto defaults in the performance of this Contract, or of work commenced under work orders as provided for herein, the other party has the option to terminate this Contract and the work order involved.

(17) No waiver by Drilling Contractor of any of the terms, provisions, or conditions hereof shall be effective unless said waiver shall be in writing and signed by an authorized representative of Drilling Contractor.

(18) All notices to be given with respect to this Contract and applicable work orders unless provided for shall be given to the Drilling Contractor and to the Subcontractor respectively at the addresses hereinabove shown. All sums payable hereunder to Subcontractor shall be payable at Drilling Contractor's address hereinabove shown unless otherwise specified herein or in the applicable work order.

(19) As a part of the consideration for this Agreement, Subcontractor hereby agrees that the provisions of paragraphs 8 (Waiver of Subrogation), 9 (Indemnity), 10 (Loss of Subcontractor's Equipment) and 14 (Patent Infringement) shall extend to and be enforceable by and for the benefit of any Owner or Operator for whom Drilling Contractor is performing operations or services.

(20) The provisions hereof shall extend to and apply to situations where Ocean Drilling & Exploration Company is

engaged in operations as a drilling contractor, as an operator, and as an owner or co-owner of oil and gas properties upon which the work contemplated hereunder is being performed.

(21) Except to the extent that this agreement may be exempt therefrom, Subcontractor agrees to comply with the provisions of 41 CFR Part 60-1 and Executive Order No. 11246.

During the performance of this contract, the sub-contractor (hereafter in this paragraph 21 referred to as "contractor") agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national original.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's committments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

IN WITNESS WHEREOF, the parties hereto have executed this Contract upon the date above shown in several counterparts, each of which shall be considered as an original.

WITNESSES:

s/ Lewis H. Pitman — OCEAN DRILLING & EXPLORATION COMPANY

s/ M. Wilkinson — By: s/ Alton J. Farmer
Drilling Contractor

s/ Debbie Ortego — QUALITY EQUIPMENT, INC.

s/ Vernon C. King, Jr. — By: s/ Max Harding
Subcontractor

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-916

OCEAN DRILLING AND EXPLORATION COMPANY,
Petitioner

versus

QUALITY EQUIPMENT, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OCTOBER TERM 1978

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Quality Equipment, Inc., respectfully requests that this Court deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE HOLDING OF THE COURT OF APPEALS THAT THE INDEMNITY PROVISION OF PARAGRAPH 9 OF THE MASTER SERVICE CONTRACT IS AMBIGUOUS IS SUPPORTED BY LOUISIANA LAW AND IS NOT IN DIRECT AND IRRECONCILABLE CONFLICT WITH CONTROLLING LOUISIANA JURISPRUDENCE

Initially, the Petitioner has chosen to divide all Louisiana jurisprudence regarding indemnity contracts into two categories, namely, cases in which the indemnitor agrees to hold the indemnitee harmless from any liability which may be imposed upon him as a result of the indemnitee's actions and cases in which the indemnitor also agrees specifically to indemnify the indemnitee for the indemnitee's own negligence. In support of this distinction, the petitioner cites *Hospital Service District No. 1 v. Delta Gas, Inc.*, 171 So. 2d 293 (La. App. 1955). A careful reading of that opinion, especially the language distinguishing the above cited case and *Buford v. Sewerage and Water Bd. of New Orleans*, 175 So. 110 (La. App. 1937), reveals that the Court distinguished the two cases on the basis that an insurance agreement was in effect in the former case but not the latter. *Hospital Service District No. 1 v. Delta Gas, Inc.*, supra at 300. No comment was made with respect to a distinction between indemnity stipulations which expressly include an assumption of liability for the indemnitee's negligence from those in which such an undertaking is not expressed. Thus, the fact that the Fifth Circuit, in supporting its finding of ambiguity of ODECO's indemnity agreement, relied on Louisiana cases which interpreted indemnity agreements which did not include an assumption of liability for the indemnitee's negligence was proper under Louisiana jurisprudence.

Additionally, the Respondent submits that the Fifth Circuit was correct in adopting the rules of construction set forth in well-settled jurisprudence which did not interpret an indemnity provision that included a clause requiring an assumption of indemnification when the indemnitee was negligent. See: *Brown v. Seaboard Coast R.R. Co.*, 554 F.2d 1299 (CA5 1977) (The mere use of the phrase "any and all

claims" in an indemnity clause does not suffice unambiguously to sweep within it the literal reach of the words used.); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410, 414 (CA5 1958) ("it is an area in which to cover *all* does not include one of the parts"); *Green v. Taca International Airlines*, 304 So.2d 357 (La. 1974) (a contract of indemnity will not be construed to indemnify indemnitee against losses resulting to him through his own negligence, where such intention is not expressed in unequivocal terms.); *Arnold v. Stupp Corp.*, 205 So.2d 797 (La. App. 1967) ("any and all liability"); and *Buford v. Sewerage and Water Bd. of New Orleans*, supra ("all suits or actions of any name or description"). From these rules of construction, which are applicable in the interpretation of *all* indemnity agreements, the Fifth Circuit properly concluded that while Quality Equipment is required to indemnify ODECO for losses caused by ODECO's own negligence any application of the indemnification agreement to a particular subclass of claims, specifically pre-existing defects or negligence, creates an ambiguity.

The next major Louisiana case which the Petitioner sets forth in support of its claim that the indemnity agreement in the case at bar is unambiguous is *Jennings v. Ralston Purina Co.* 201 So.2d 168 (La.App. 1967); *cert. denied* 203 So.2d 554. In that case, the Court determined that an indemnity provision must be strictly construed. However, in construing the provision the Court apparently misread the indemnity provision and added an extra phrase to the provision when it stated:

> . . .(W)e cannot conceive of any conclusion which would detract from the clearly quoted, specifically stated and thoroughly comprehensive obliga-

> tion on the part of Efurd to indemnify Ralston against *any damage or injury arising out of the performance of the contract* whether or not such damage resulted from Ralston's negligence. *Jennings v. Ralston Purina Co.*, supra at 175.

The Court should not have included the phrase "whether or not such damage resulted from Ralston's negligence". A Louisiana commentator has opined that had the Court not misread the agreement by adding the above mentioned phrase and instead defined the indemnitor's obligation "as one simply to indemnify for loss, damage or injury 'resulting from the performance of the contract', the Court would have undoubtedly denied Ralston indemnification for its own negligence." Borrello, *Contractual Indemnity: Interpretation and Effect*, 26 La. B.J. 90, 95.

Further, the reading by the Court of the extra phrase is inconsistent with numerous Louisiana cases, including, *Buford v. Sewerage and Water Bd. of New Orleans*, supra. and *Cole v. Chevron Chemical Company*, 477 F.2d 361 (CA5 1973). In each of these decisions, the Court determined that indemnification claims "arising out of" contractual performance are not sufficient to cause the indemnitor to be obligated to protect against the indemnitee's negligence. Accordingly, *Jennings v. Ralston Purina Co.*, supra, the very case which the Petitioner claims to be at variance with the Fifth Circuit's decision, is itself at variance with Louisiana jurisprudence.

The Petitioner next directs this Honorable Court's attention to *Polozola v. Garlock, Inc.*,343 So.2d 1000 (La. 1977), where the Louisiana Supreme Court determined an indem-

nity agreement, which included explicit reference to the indemnitee's negligence, to be enforceable. The question of ambiguity was raised because in three instances in the indemnity provision the indemnitee was named as "Dow, its agents, servants and employees", while in the fourth instance, specifically relating to the indemnitee's negligence, only the term "Dow" was used. Upon applying the rule of construction that when there is doubt as to the true sense of the words of a contract, they may be interpreted by referring to other words and phrases in the same contract, the Court determined that no ambiguity existed. *Polozola v. Garlock, Inc.*, supra at 1003. Further,

> "when there is anything doubtful in agreements, including indemnification agreements, we must endeavor to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the parties. La. Civil Code Art. 1950 (1870)".
> *Polozola v. Garlock, Inc.*, supra at 1003.

There are no other words or phrases in the ODECO Master Service Contract to which reference can be made to resolve the ambiguity concerning the coverage of pre-existing defects.

Thus far, the Louisiana jurisprudence which the Petitioner contends is at variance with the Fifth Circuit's opinion in the case at bar has been shown to support the finding that Paragraph 9 of the Master Service Contract is ambiguous rather than show that provision was unambiguous. The cited cases do not show that the indemnification agreement is "clear, specifically stated, thoroughly comprehensive and unambigu-

ous." (Petitioner's Brief p. 10) It is respectfully submitted that there exists no conflict between the decision of the Fifth Circuit and controlling Louisiana jurisprudence.

In support of its contention that the Fifth Circuit was proper in holding the indemnity provision ambiguous, the Respondent cites *Lee v. Allied Chemical Corporation*, 331 So. 2d 608 (La. App. 1976). The plaintiff in that case was complaining of a condition of the premises. However, in addition to agreeing to indemnify Allied for its own negligence, the indemnitor agreed to indemnify Allied for ". . . injury, death, or damage which may have been caused by . . . the condition of the premises or otherwise." The Court determined that the inclusion of the phrase "the condition of the premises" enumerated the conditions, in addition to the negligence of the indemnitee, under which indemnification would be operative. No such clause is included in ODECO's Master Service Contract. It is submitted that the Fifth Circuit was correct in that the indemnity provision is ambiguous since the pre-existing defects are not specifically enumerated.

The Petitioner further contends that decisions of federal courts sitting in Louisiana and applying Louisiana law support its claim that the indemnity provision is unambiguous. None of the cases cited involved a claim of ambiguity of the indemnity provisions with respect to a pre-existing defect or negligence on the part of the indemnitee prior to engaging in work pursuant to a service contract. All of the cases were determined either on the issue of whether the injury was incident to or arising out of work being performed by the indemnitor or whether or not the agreement provided indemnification for the indemnitee's negligence. Since none of the

cases cited by the Petitioner involved a pre-existing defect or negligence, they can have no controlling effect on the case at bar. It is clear that in order to properly treat this issue it was necessary for the Fifth Circuit to analyze it in light of existing Louisiana jurisprudence as discussed above.

To contend as the Petitioner has done that the provisions are clear and unambiguous and are thus enforceable is to ignore the factual circumstances and situations which surround the relationships of all the parties. The contract is a form contract drafted by the Petitioner, ODECO. The condition which caused the plaintiff's accident, a pre-existing defect in a ladder, was in existence prior to the execution of the contract by the parties. The ladder in question was constructed with ODECO's knowledge and under its supervision. It had knowledge of the fact that the ladder was inadequate and dangerous. Certainly, the intentions of the parties with respect to this condition or any like condition were not clearly expressed in the contract, particularly in light of the fact that ODECO knew of the condition before entering into the contract and now attempts to excuse itself and impose its liability on the Respondent by continuing to assert that a clearly ambiguous contract is unambiguous. The Respondent contends that the obligation to indemnify ODECO would be activated only when the negligent condition or act was subsequent to the execution of the indemnity agreement in question. None of the cases set forth by the Petitioner opposes that contention.

Certainly, no reasonable man could contend that the indemnification provision would be activated when a personal injury was caused by a condition which pre-existed the contract and of which only one party had knowledge. To so

contend would give retrospective rather than prospective effect to contracts. Under Louisiana law, where a dispute exists over the terms of a contract, the controversy must be resolved in light of the established principle that informed and experienced parties do not ordinarily bind themselves to unreasonable obligations. *Burt v. Hebert*, 338 So.2d 717 (La. App. 1976); *Makofsky v. Cunningham*, 576 F.2d 1223 (CA5 1978). This is borne out by the trial testimony of Mr. Max Harding, President of Quality Equipment, Inc. Mr. Harding's testimony resolved the ambiguity of the indemnity provision when he testified that the parties did not intend to cover injuries caused by pre-existing defects. *Mott v. Ocean Drilling & Exploration Company*, 577 F.2d 273, 278 (CA5 1978).

If it is determined that the decisions of federal courts applying Louisiana law are relevant despite factual dissimilarity, the Respondent contends that the cases exhibit an adherence to the rules of construction of indemnity provisions in Louisiana. Specifically, in *Day v. Ocean Drilling & Exploration Co.*, 353 F.Supp. 1350 (E.D.La. 1973), the Court considered the same Paragraph 9 of the Master Service Contract. The Court determined that under Louisiana law an indemnity agreement is to be read narrowly, but not disregarded. Additionally, the Court stated that the agreement must be given effect according to the intention of the parties. In the instant case, the Fifth Circuit did not disregard the indemnity agreement without first properly applying Louisiana rules of interpretation to determine the intent of the parties.

In *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (CA5 1975), the same ODECO indemnity provision was

held to be operative. However, the Fifth Circuit, in the instant case, is not primarily concerned with the clause "incident to, arising out of, in connection with . . . " as in *Hicks*. Instead, the Court was primarily concerned with the effect of a pre-existing condition on the indemnification provision. The argument that the incident was not "incident to, arising out of, in connection with . . ." is only secondary to the determination of the intent of the parties with respect to the pre-existing defect.

In *Cormier v. Rowan Drilling Co.*, 549 F. 2d 963 (CA5 1977), the Court was concerned with reciprocal indemnity provisions between Continental Oil Company and Rowan Drilling Company whereby each agreed to indemnify the other for any claims brought by their respective employees. Despite precise terms identifying their rights respecting a claim by their respective employees, the Court determined that the contract was silent as to the claims of third parties or the employee of a third party. Since the contract was silent on that important matter, the Court, without the benefit of the intent of the parties, determined that the contractual agreement of indemnity did not apply. The Respondent urges that the ODECO indemnity agreement is silent with respect to pre-existing defects and thus should not apply as was correctly determined by the Fifth Circuit.

Quality Equipment, Inc. respectfully submits that there is no direct conflict between controlling state precedent and the decision of the Fifth Circuit in the case at bar. Rather, it is submitted that the Fifth Circuit followed sound principles of contractual interpretation in concluding that the indemnity provision is ambiguous. Accordingly, a writ of certiorari should be denied.

II.

THE HOLDING OF THE COURT OF APPEALS THAT THE INDEMNITY PROVISION OF PARAGRAPH 9 OF THE MASTER SERVICE CONTRACT IS AMBIGUOUS RELIES UPON TEXAS RULES OF CONTRACT INTERPRETATION BUT DOES NOT CREATE A DIRECT CONFLICT WITH FEDERAL STATUTES AND DECISIONS OF THIS COURT.

It is clear that Louisiana law is the applicable standard to utilize in determining this matter. Despite the fact the Fifth Circuit relied on a case which stated Texas principles of law, *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (CA5 1969), Respondent contends that the result would have been the same had Louisiana principles of contract interpretation been applied. The primary issue is the effect of the pre-existing defect and not whether the plaintiff's injury was "incident to, arising out of, in connection with . . ." the work of Respondent. However, both issues in this matter are unclear with respect to the intent of the parties given the fact situation involved. Under Louisiana law, when the terms of a written agreement are susceptible of more than a single interpretation, or where ambiguity or uncertainty exists as to the contractual provisions, or where the intent of the parties cannot be ascertained from the contract itself, parol evidence is admissible to clarify the ambiguities and to show the intentions of the parties. *Capizzo v. Traders and General Insurance Co.*, 191 So.2d 183 (La. App. 1966).

This conclusion, that Texas law and Louisiana law would produce the same result is supported in *Day v. Ocean Drilling*

& Exploration Co., supra. In that case, Judge Alvin Rubin stated that there was a "host of cases" in Louisiana and elsewhere dealing with the meaning to be attached to terms like "arising out of" and "in connection with" when used in indemnity agreements. Included in the cases elsewhere are *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, supra, and *Alamo Lumber Co. v. Warren Petroleum Co.*, 316 F.2d 287 (CA5 1963), the two cases relied upon by the Fifth Circuit in this matter. Judge Rubin further states that while the cases "deal with interpretation of the law of other states, or with matters arising in admiralty, they do not appear to be circumscribed by these differences. *Day v. Ocean Drilling & Exploration Co.*, supra at 1352. Thus *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, supra, would prescribe no result different from the application of Louisiana jurisprudence.

Again, Respondent contends that *Hicks v. Ocean Drilling & Exploration Co.*, supra, and other cases cited by the Petitioner are inapposite because of the ambiguity created concerning the intent of the parties with respect to indemnification for pre-existing conditions. Further, the Louisiana cases cited by the Petitioner concerning Louisiana law are inapposite as previously shown.

It is respectfully submitted that the Fifth Circuit applied case law, although of another jurisdiction than Louisiana, but that the result would be the same under applicable Louisiana jurisprudence. Accordingly, there exists no basis for the contention that inapplicable law created a conflict between statutes and decisions of this Court. The writ of certiorari should not issue because there is no real conflict to be resolved.

CONCLUSION

The Respondent respectfully submits that no conflict between the Fifth Circuit decision and Louisiana jurisprudence exists. Rather, Louisiana jurisprudence supports the decision of the Court of Appeals. Further, there is no real conflict between the Fifth Circuit decision and federal statutes and decisions of this Court. Additionally, the application of Louisiana jurisprudence would dictate the same result.

Respectfully submitted,

LAWRENCE E. ABBOTT
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Telephone: (504) 568-9393

Counsel for Respondent, Quality Equipment, Inc.

CERTIFICATE OF SERVICE

Undersigned counsel for respondent has caused three copies of the foregoing Respondent's Brief in Opposition to be served on W. K. Christovich, C. Edgar Cloutier, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana 70130, and Joseph J. Weigand, Post Office Box 6062, Houma, Louisiana 70361, by placing same in the U. S. Mail, First Class, postage prepaid, this 29th day of January, 1979.

LAWRENCE E. ABBOTT